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**IN THE
COURT OF APPEALS OF INDIANA**

TERRI SANDERS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0608-CR-623
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott Devries, Commissioner
Cause No. 49F18-0501-FD-004441

March 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Terri Sanders appeals her conviction for Theft,¹ a class D felony. Specifically, Sanders argues that the trial court abused its discretion when it allowed loss-prevention officer Doug Swails to testify regarding what he observed on the video feed from the store security camera because the videotape was not produced at trial. Finding that the trial court did not abuse its discretion by allowing Swails to testify, we affirm the judgment of the trial court.

FACTS

During the morning of January 10, 2005, Gloria Camp shopped at a Meijer store in Indianapolis. After shopping, Camp stopped at a U-Scan checkout register to pay for her purchases and placed her purse next to the register. Sanders was standing behind Camp at the register. When the scanner did not work, Camp moved to another register but accidentally left her purse at the first register. Upon attempting to pay for her purchases, Camp realized that she had left her purse, but the purse had disappeared when Camp went back to look for it. Camp asked Sanders if she had seen the purse, but Sanders denied seeing anything. Camp's purse contained a small amount of money, credit cards, two gift cards, a coin purse, and an address book.

Camp frantically called her sister Linda Clark at work to tell her what had occurred. Approximately fifteen minutes later, Clark received a phone call from a woman who identified herself as "Terri" and said that she had found Camp's purse in the Meijer bathroom and had "taken it home for safekeeping." Tr. p. 105. The woman told Clark that she took

¹ Ind. Code § 35-43-4-2.

Camp's purse home because she "thought it would be safer than turning it in to the [Meijer] office." Id. at 107. Clark called the Meijer store and informed Camp that her purse had been found. Sanders returned the purse to Camp later that day, but the money and gift cards that had been in the purse were missing.

Later that day, Meijer loss-prevention officer Swails examined the store's security camera video feed. Swails testified at Sanders's trial that the video feed showed Sanders standing behind Camp, taking Camp's purse when she left it on the register, and hiding the purse under a coat in her shopping cart. Swails also testified that the video feed showed Sanders purchasing the items in her shopping cart and leaving the store with Camp's purse. After viewing the video feed, Swails copied it onto a videotape and gave it to Cumberland Police Officer Lowe.² Swails did not see the videotape after that day.

On January 10, 2005, the State charged Sanders with class D felony theft. A jury trial was held on June 1, 2006, and Sanders objected to Swails's testimony regarding the video feed. The trial court overruled Sanders's objection, and the jury found Sanders guilty as charged. The trial court held a sentencing hearing on June 29, 2006, and sentenced Sanders to four hundred and eighty-five days imprisonment. Sanders appeals her conviction.

DISCUSSION AND DECISION

Sanders argues that the trial court abused its discretion by allowing Swails to testify at trial regarding what he observed on the store's video feed. Specifically, Sanders argues that

² Officer Lowe's first name does not appear in the record. It appears that Officer Lowe is no longer with the Cumberland Police Department, and the location of the videotape was unknown at the time of trial. Tr. p. 7.

the silent witness theory should have barred Swails's testimony and that the State did not meet the foundational requirements for admitting the misplaced videotape.

The decision to admit or exclude evidence is within the trial court's sound discretion, and that decision is afforded a great deal of deference on appeal. Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997). The admission or exclusion of evidence will not generally be reversed absent a manifest abuse of discretion that results in a denial of a fair trial. Zawacki v. State, 753 N.E.2d 100, 102 (Ind. Ct. App. 2001). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id. Generally, a photograph or videotape may be admitted as substantive evidence under the silent witness theory where the proponent of the exhibit has made a strong showing of the exhibit's authenticity and competency, including a showing that the exhibit has not been altered in any way. McHenry v. State, 820 N.E.2d 124, 128 (Ind. 2005).

Both Sanders and the State direct us to Pritchard v. State, 810 N.E.2d 758 (Ind. Ct. App. 2004). In Pritchard, the defendant objected to the testimony of two witnesses who had previously viewed a videotape of the defendant attacking another inmate while he was incarcerated. We specifically noted in our opinion that "the video recording in this case was never admitted . . ." and that Indiana Rule of Evidence 602³ permitted the witnesses to "testify to things that are within their personal knowledge, such as what the video recording

³ In relevant part, Indiana Rule of Evidence 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. A witness does not have personal knowledge as to a matter recalled or remembered, if the recall or remembrance

showed.” Id. at 761 n.3 (emphasis added).

The similarity between the circumstances in Pritchard and the facts presented here supports the trial court’s decision to admit Swails’s testimony. Indiana Rule of Evidence 602 permitted Swails to testify regarding what he observed on the video feed because that subject was within his personal knowledge. Sanders’s argument that the silent witness theory bars Swails’s testimony fails because, as we have previously held, that theory is inapplicable to the testimony of live witnesses. Id. (holding that “the silent witness theory is inapplicable” to the testimony of live witnesses concerning what they observed). Likewise, the videotape authentication and admission standards do not apply to Swails’s testimony as a live witness. Therefore, the trial court did not abuse its discretion by allowing Swails to testify regarding what he observed.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.

occurs only during or after hypnosis. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness.